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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal From The Supreme Court of California

BRIEF OF AMICUS CURIAE HALF MOON BAY PROPERTIES, INC. IN SUPPORT OF APPELLANTS

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BRIEF OF AMICUS CURIAE HALF MOON BAY PROPERTIES, INC. IN SUPPORT OF APPELLANTS

We file this brief on behalf of *amicus curiae* Half Moon Bay Properties, Inc., a Delaware corporation ("HMBP")[1] in support of Appellants, Donald W. Agins and Bonnie G. Agins (collectively "Agins").

Note: In quotations, footnotes are omitted and emphasis is supplied or omitted by us unless otherwise indicated.

[1]Counsel for both parties have granted consent to submission of this brief pursuant to Supreme Court Rule 42. We have lodged the original letters of consent with the Clerk of this Court and have included copies of the letters in Appendix A.

STATEMENT OF INTEREST AND POSITION OF AMICUS CURIAE

HMBP owns 7,550 acres of land in San Mateo County, California.[2] The ordinances which control development of that land purport to permit certain uses as do the ordinances which restrict development of the Agins' property. However, these permitted uses are all illusory.

Through state and local land use regulations similar to those applied by the City of Tiburon to the Agins' property, the County of San Mateo and the City of Half Moon Bay have restricted HMBP to development of a *maximum* of 59 residential dwellings on 7,510 of those acres.[3]

As a consequence, HMBP has become expert in the subtle, many and varied ways local governments apply California planning and subdivision law to prevent all use of property. HMBP can, we think, contribute substantially to an exposition of these issues before the Court.

The California planning process works to confront property owners with an endlessly shifting set of standards and controls so that uses apparently permitted (such as agriculture in the case of HMBP and low density residential in the case of Agins) are actually strictly prohibited or rendered economically unfeasible through the application of related regulation. These standards and controls are so pervasive and complex that a decree invalidating an unduly restrictive regulation would not vindicate the rights violated unless the court were willing to retain jurisdiction and perform the land use planning function itself.

[2]All acreages are approximate.

[3]The remaining 40 acres may be used for commercial and industrial purposes.

Accordingly, we believe compensation is the only workable remedy.

More significantly, HMBP can demonstrate that the fundamental fear which prompted the court below to stand existing law on its head—the purported "chilling effect" of compensatory awards in cases where land use regulation becomes unduly restrictive—is baseless. By providing a simple administrative remedy in its land use planning ordinance, a local government can protect itself from liability for compensation resulting from the unintended or unexpected impact of its regulations. (*Post,* Argument, Part B.2.) Since this procedure can be adopted as an urgency measure to take immediate effect, the Court may reverse and remand this case secure in the knowledge that the constitutional rights of private property owners have been preserved without exposing local California governments to any greater risk of liability than they now face.

In order to place in perspective the interest of HMBP in this case and its ability to contribute to an exposition of the issues presented, we describe briefly its land holdings and the restrictions to which they have been subjected.

HMBP's lands are, like Agins', located in the San Francisco Bay Area within accepted commuting distance of centers of employment. The region currently experiences a severe housing shortage with rapidly escalating housing costs.

Six thousand seven hundred acres are under the jurisdiction of the County of San Mateo. Under prior County plans, in effect until the early 1970's, this property was planned for development of approximately 6,000 residen-

tial dwelling units with related support and service commercial facilities. *Such development was officially considered to be and was in fact feasible in all respects.* Current County regulation, however, has zoned 4,640 acres "Open Space" and placed these lands under study for restriction to exclusively agricultural uses. Another 1,700 acres have been designated "park" on the adopted County General Plan. Two hundred more acres are already restricted to agriculture. The remaining 160 acres are designated for "urban use"; but of those, 120 acres may be divided into only 22 residential lots. The remaining 40 acres bears an "industrial and commercial" use designation. In summary then, on the 6,700 acres owned by HMBP under the jurisdiction of the County, *22 residential dwelling units are permitted and 40 acres may be developed for industrial and commercial purposes,* the balance essentially being restricted to agriculture and park uses.

Eight hundred fifty acres of HMBP's lands lie within the City of Half Moon Bay. This property is currently zoned for 1,050 dwelling units although the general plan probably restricts overall density to 900 units. Development to these densities is feasible. But a currently pending plan will restrict development *to a total of 37 dwelling units.* Under Calif. Govt. Code § 65858, the pending 37 dwelling unit limitation prevails since no development can occur which will conflict with it. Restriction to 37 units is supposed to promote agricultural use on the balance of HMBP's lands.

Restriction of lands to agriculture *appears* to allow a use. That appearance misleads. Although the soils might accommodate commercial agriculture, water supplies are

inadequate and essential agricultural infrastructure is totally lacking.[4] Official reports confirm that commercial agriculture is not viable within the County or the City except for limited production of flowers for decorative and nursery purposes.[5] This type of agricultural enterprise uses large quantities of scarce water and energy resources and requires extensive land grading as well as pesticide, herbicide and chemical fertilizer applications. The market could not absorb the product which would result if only a minor fraction of the lands of HMBP were devoted to floriculture, even if it be assumed that sufficient water could be found and the agricultural practices required by floriculture were permitted. However, other regulations of County and State agencies prohibit such practices and prevent development of essential water supplies. In short, agricultural use is economically unfeasible;[6] and nothing else is allowed.

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[4]The use of land on the coastside of San Mateo County for agricultural purposes would be economically unfeasible even if adequate water supplies and an agricultural infrastructure were available and land values and carrying costs, such as property taxes, were excluded from the equation, since the costs of existing and potential sources of water are 4 to 20 times greater than the cost of water elsewhere in California and all of the major crops which can be grown on the coastside will grow in other regions of California. John M. Sanger Associates, Inc., AGRICULTURE, A STUDY PAPER FOR PUBLIC REVIEW AND COMMENT, HALF MOON BAY LOCAL COASTAL PROGRAM (July 13, 1979).

[5]*E.g.*, MacDonald & Smart, COASTSIDE ECONOMIC STUDY (1975), a study commissioned by the County of San Mateo.

[6]We use the term "economically unfeasible" to describe development options which would cost more to implement than the finished product would yield, *assuming a zero value for the land.* Agricultural use is "economically unfeasible" when the costs of growing the product (seed, water, fertilizer, planting, cultivation, harvesting, etc.) exceeds the gross income from sale of it. In the residential case, if local development standards result in a lot development *cost* of $100,000 or more in a market where the lot sales price would be $100,000 or less, development is "economically unfeasible."

STATEMENT OF THE CASE

The opinion below, *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979) (Jurisdictional Statement Appendix ("Jur. Stmt. App.") 1) and the Jurisdictional Statement itself extensively state the facts. We will not expand upon that statement except for purposes germane to the argument we make below.

The Agins' Complaint alleges that the ordinance implementing the open space plan which "forever prevented the development for residential use or otherwise" (Complaint ¶ IV, Joint Appendix ("J. App.") 5):

> ". . . has completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever; and the natural and proximate result of said ordinance has been to prevent any sale, use, transfer, or development thereof or any part thereof." Complaint ¶ IX, J. App. 6-7.

Tiburon's ordinances well illustrate the deceptive will-o-the-wisp quality of California land use regulation. Section 2 of Ordinance 124 N.S. (Jur. Stmt. App. 41 *et seq.*) rezoned Agins' property to "RPD-1" ("RPD" meaning Residential Planned Development). (Jur. Stmt. App. 45.) Section 2 of Ord. 124 N.S. is based upon extensive recitations of purpose contained in Section 1. For example, Section 1(b) (Jur. Stmt. App. 42) states:

> "The preservation and conservation of open space land is necessary to assure its continued availability for agricultural purposes, for the enjoyment of scenic beauty, for recreation, for protection of the ecology and environment, for the containment of urban sprawl and structuring and shaping of urban development, and for retention in its *natural or near natural state* to protect the community against hazards resulting from its disturbance by man or nature."

The other statements of purpose are uniformly consistent with the notion that the land in question should not be used for any purpose requiring change or development of any kind since such use may destroy "scenic beauty," disturb the "ecology and environment," etc. Ord. 124 N.S., § 1(c), Jur. Stmt. App. 42.

Ordinance 124 N.S. was adopted on June 28, 1973. Jur. Stmt. App. 46. On the same day, Tiburon adopted Ordinance 123 N.S. establishing the standards for the RPD-1 District and certain other districts referred to in Section 2 of Ord. 124 N.S. (Jur. Stmt. App. 40.) Section 10-4(C) of Ord. 123 N.S. states that: "One-family dwellings" are *"Allowed By Right"* in RPD-1 Districts. Jur. Stmt. App. 31. Section 10-4(D)(1) states that "density shall be not less than .2 nor more than 1 dwelling unit per gross acre, *subject to the provisions of § 10-4(F)"*. Jur. Stmt. App. 32. The court below concluded that these provisions allowed Appellants to have "by right" at least one dwelling unit on their five acres. 24 Cal. 3d at 271. From this conclusion the court determined, notwithstanding the allegations of Agins' Complaint to the contrary, that they had an economic and beneficial use for their land. The court below was wrong, and for two reasons.

First, it ignored the conditions of § 10-4(F), to which the density provision is "subject." That section requires preparation of a "Master Plan" under § 10-4(G) (Jur. Stmt. App. 32), which states:

> "No building permit shall be issued for improvements of any type until a Master Plan and Precise

> Plan for the development have, after public hearing, been approved by resolutions of the Planning Commission, and only until after the City Council, after Public hearing, has by ordinance approved the Master Plan and by resolution, the Precise Plan." Jur. Stmt. App. 33.

The requirements for Master Plan and Precise Plan are too extensive to recite here, occupying three full pages of printed appendix (Jur. Stmt. App. 33-36.) Suffice it to say, however, that they require detailed and extensive planning of all public and private facilities on the subject parcel as well as all parcels in the neighborhood which might be affected by the proposed development.

Before approval of any Master Plan "affirmative findings must be made by the Planning Commission and City Council" with respect to four factors which include, among others, preservation of "*maximum* compatibility" with adjoining development and open space (§ 10-4(F)(2)), and "*maximum* effort . . . to *minimize* grading and *maximize* retention and preservation of natural elevations, ridgelands and natural features" (§ 10-4(F)(3)). Jur. Stmt. App. 32-33. Without such affirmative findings, *no development can be approved at all* on the face of the ordinance notwithstanding the apparent allowance "by right" of one family dwellings under § 10-4(C)(1). Jur. Stmt. App. 31. And under California law these sections must be construed to effectuate their purpose,[7] fulsomely recited in Ordinance 124 N.S. and in § 10-4(A) of Ordinance 123 N.S. (Jur.

[7] *Friends of Mammoth v. Mono County*, 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972).

Stmt. App. 30), which include "retention of land in its *natural* or *near natural* state" and similar objectives.

In short, the California Supreme Court's conclusion that the Tiburon ordinances allow the Agins any use at all for their land is not supported on the face of the ordinance. On the contrary, the ordinance purports to allow a use "of right"—which can only be exercised after compliance with exhaustive, exhausting, complex and expensive procedures yielding the property owner nothing at the end of the exercise, unless the governing body can make specific and detailed findings that the use proposed does the *maximum* which can be done to preserve land in a "natural or near natural state." To decide that such an ordinance structure conclusively allows a property owner a use, without a trial and in the face of an allegation to the contrary, is to swallow whole a very large bill of goods indeed.[8]

The court's second error can be exposed much more simply: the facial appearance that Ordinance 123 N.S. and Ordinance 124 N.S. leave the Agins with a theoretical use

[8] Such procedural frustration of apparently permitted uses is a common feature of "open space" ordinances. Portions of HMBP's lands, for example, are subject to an open space ordinance which purports to allow low-density residential use. The number and placement of the units is determined by an elaborate "density matrix" formulation. HMBP undertook a study of one of its holdings (admittedly large in area) and discovered that to apply that formulation would require more than *five hundred days* of processing and notice periods under existing hearing and assessment procedures assuming adherence to the fastest permissible schedule. HMBP estimated that the processing cost would exceed $250,000. And at the end of the process, HMBP could easily end up with nothing—no permitted use at all—due to the County's inability or unwillingness to make the required findings of compatability between the project and "open space" objectives.

for their property does not overcome their allegation that the use is worthless for all practical purposes.[9] On demurrer that allegation requires no support—but the impossible requirements or Ord. 123 N.S. amply support it in any case.

SUMMARY OF ARGUMENT

1. When the collective effect of government regulation is to deprive a landowner of *all*[10] economically feasible use of his property, government has taken that property without just compensation in violation of the Fifth and Fourteenth Amendments. Money damages are the proper remedy for such a taking. Money damages are consistently awarded in inverse condemnations caused by government's physical interference with private lands. The rationale which underlies such awards is that when a public benefit is created by impairing an owner's use of his land, the benefitting public must share the owner's burden by paying him compensation for his loss. That rationale applies equally and especially when the taking occurs by deliberate regulation rather than invasion.

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[9]Perhaps the issue would have been more clearly framed if the Agins' Complaint had read that "notwithstanding the apparent permission on the face of Ordinance 124 N.S. to develop the subject property for at least one residential dwelling unit, the requirements imposed by Ordinance 123 N.S. and other ordinances applicable to development in the RPD-1 zone operate together forever to prevent development," etc. We submit that these refinements are fairly read into the Complaint.

[10]We do not contend that restrictions with lesser impact are constitutionally permissible. We use the definition of economic unfeasibility because it places the constitutional issue of highly restrictive land use regulation and open space zoning in stark relief —and it illustrates the degree of restriction suffered by HMBP and by the Agins, if their Complaint is taken as true on its face as it must be on this appeal.

2. The policy reasons on which the court below relied in denying compensation are, we submit, demonstrably false. Local government is not free to violate constitutional rights on the excuse that it would be too expensive to respect them. The lower court's fear—that allowing a compensation remedy will expose local governments to unexpected damage claims—does not justify a denial of compensation where local government has *deliberately* employed its regulations to prevent any use of land. Moreover, local governments can easily establish an administrative remedy under which they can remove the confiscatory effect of their regulations before the aggrieved landowner may file suit.

3. Compensation is the only effective form of relief here. The remedy to which the court below limited the Agins—a declaration that the offending ordinance is invalid—is utterly useless to vindicate the constitutional rights violated. The land use laws of California create an endlessly shifting maze of regulation in which local government can improperly prevent land use by dozens of procedural and legislative devices. Under this system any local government that wants to block use of a given land parcel can do so effectively forever, however many of its ordinances are invalidated by the courts. Unless the courts are prepared to take over from local government the entire land use planning function, compensation is the only effective remedy—as well as the traditionally preferable one.

ARGUMENT

A. Government Regulation Which Precludes All Economically Feasible Use Of Property Is A Taking Of That Property—Compensation Must Be Paid For It

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth, guarantees that:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*"

The court below held that Appellants may not recover just compensation even if all use of their land has been taken from them by Tiburon's regulation. Since this Court is the final arbiter of questions of federal constitutional right, the court below purported to rely on opinions of this Court in reaching its conclusion. We submit it misread the law.

1. This Court's Opinions Establish That Compensation Is A Proper Remedy For Taking By Regulation

The "taking" clause of the Fifth Amendment has, of course, applied classically to government seizure or physical invasion of private property. But the law has long been clear that governmental regulation of land use may become so onerous as to become a "taking" in the Fifth Amendment sense. As the Court stated in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922):

> "When it [diminution of property value through regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain *and compensation* to sustain the act."

The passage plainly implies that compensation is the proper remedy for taking by regulation. Despite citation in many subsequent opinions, the Court has never "explained" *Pennsylvania Coal* to mean that a property owner may not recover money damages as a remedy for regulation exceeding permissible bounds. To the contrary, the Court wrote in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958):

> "[W]e have recognized that action in the form of regulation can so diminish the value of property *as to constitute a taking.* [Citations.] However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough *to establish the owner's right to compensation.*"

This statement clearly implies that compensation is an available remedy.[11]

The Court has had occasion to deal recently with questions similar to those raised by this case in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) and in *Kaiser Aetna v. United States,* ..... U.S. ....., 100 S. Ct. 383, 62 L. Ed. 2d 332, 48 U.S.L.W. 4045 (December 4, 1979). Neither case is directly on point, but each is illuminating on the question here in issue.

Kaiser Aetna states that the property owner has the right to recover compensation, emphasizing that (i) the

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[11] *See also Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962):

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking *which constitutionally requires compensation.*"

See also United States v. General Motors Corp., 323 U.S. 373 (1945).

validity of the regulation and (ii) the entitlement of specific property owners to be compensated by reason of its application to them, *are separate questions.* 48 U.S.L.W. 4048. The court below adopted the opposite approach, combining the two inquiries into one, denying the right to compensation.

Kaiser Aetna concerned the regulatory power of Congress over national waters under the Commerce Clause rather than an exercise of police power. But the issues are essentially the same. This Court stated:

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to [the navigable waters in question] if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). As was recently pointed out in *Penn Central Transportation Co. v. City of New York,* 46 U.S.L.W. 4856 (1978), this Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons.' *Id.*, at 4862." 48 U.S.L.W. at 4048, 100 S. Ct. at 390.

The passage from *Penn Central* cited in *Kaiser Aetna* also contemplates *compensation* as a remedy for excessive regulation. *Penn Central* is a zoning case, dealing with the police power of the State of New York (as *Agins* deals with the police power of the State of California) and not the commerce power.

In *Penn Central* the property owner stipulated away the decisive issue—conceding that the restriction left the property owner with an economically feasible use. The Court summarized, among the issues *not* in dispute, the following:

> "They [the property owners] accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded appellants by virtue of Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has affected a 'taking.'" 438 U.S. at 129.

Thus the opinion is *dictum* for purposes of this case. Nonetheless, it is illuminating to examine the record in *Penn Central.* For example:

> "The [New York] Appellate Division held that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks *and therefore that appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property.* The Appellate Division held that the evidence appellants introduced at trial—'Statements of Revenues and Costs,' purporting to show a net operating loss for the years 1969 and 1971, which were prepared for the instant litigation—had not satisfied their burden. First, the court rejected the claim that these statements showed that the Terminal was operating at a loss . . . . Further, the Appellate Division concluded that appellants

had failed to establish either that they were unable to increase the Terminal's commercial income by transforming vacant or underutilized space to revenue-producing use, or that the unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites. *The Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use. . . .*" 438 U.S. at 119-20.

The Agins here contend that Tiburon's regulations deprive them of *all* reasonable beneficial use of their property. Complaint ¶ IV, J. App. 5.

The *Penn Central* opinion then turns to the due process question:

"[T]he Court of Appeals held that appellants' attack on the law could prevail only if the law deprived appellants of their property in violation of the Due Process Clause of the Fourteenth Amendment. *Whether or not there was a denial of substantive due process turned on whether the restrictions deprived Penn Central of a 'reasonable return' on the 'privately created and privately managed ingredient' of the Terminal.*" 438 U.S. at 121.

The Agins' Complaint here offers to show that Tiburon's regulations would deprive it of *all* return on the subject property. Complaint ¶ IX, J. App. 7.

This Court affirmed the decision of the New York Court of Appeals in *Penn Central*. The opinion stands for the proposition that a property owner who challenges the constitutionality of a land use restriction cannot make his case when he concedes that the restriction leaves him with

a reasonable return on his investment and valuable uses for his property (438 U.S. at 129). In stating the controlling principles, this Court has declared that *compensation* for economic injury flowing from excessively burdensome regulation is required when justice and fairness so dictate. Appellants contend here that they have been deprived of *all* use and *all* return, essentially the maximum burden possible under the circumstances.

2. The Rationale For Awarding Compensation Applies To Regulation Cases

The rationale for awarding damages in inverse condemnation is well known. The California Supreme Court itself stated in *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 90 Cal. Rptr. 345, 475 P.2d 441 (1970):

"The relevant 'policy' basis of [California's just compensation clause] was succinctly defined in *Clement v. State Reclamation Board* (1950) 35 Cal.2d 268, 642 [220 P.2d 897]: 'The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' In other words, the underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of public improvements' (*Bacich v. Board of Control* (1943) 23 Cal.2d 343, 350 [144 P.2d 818]): 'to socialize the burden . . .—to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society' (Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 166 Wis.L.Rev. 3, 8)."

Accord, Albers v. City of Los Angeles, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965). In *House v. L.A. County Flood Control Dist.,* 25 Cal. 2d 384, 397, 153 P.2d 950 (1944) Mr. Justice Traynor, concurring, wrote.

> "It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, *since the measure of liability is not the benefit derived from the property, but the loss to the owner.*"

This Court expressed the same concept in *Armstrong v. United States,* 364 U.S. 40, 49 (1960):

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

And again in *United States v. Willow River Co.,* 324 U.S. 499, 502 (1945):

> "The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

This theory upon which recovery is based—the desire to socialize burdens imposed to secure public benefit—is not rationally limited to damage directly caused by physical invasion. Consider, for example, the case at bar. Tiburon has, through its ordinances, effectively compelled the Agins to maintain their land as "open space" for the aesthetic pleasure of Tiburon's residents. Had Tiburon instead forcibly seized Agins' property and staked it out as "open space preserve", the loss to the Agins—and the benefit to Tiburon residents—would be no different. Yet the court below has denied compensation in the first case, although it clearly would be proper in the second. There is no ground in logic to justify the difference. Nor is there any ground in policy—a subject to which we next turn.

B. The "Chilling Effect" Rationale Cited Below Is A Spurious Excuse For Denying The Constitutional Right To Just Compensation. Local Governments Can Easily Protect Themselves Against Unexpected Compensation Claims

The California Supreme Court in *Agins* expressed the concern that the rule allowing a property owner compensation for unreasonable regulation would excessively burden the legitimate processes of government. 24 Cal. 3d at 275-76. We refer to the contention as the "chilling effect" limitation for the sake of convenience, adopting the terminology of the *Agins* opinion.

We feel obliged to point out first that this idea is a breathtaking assault on the concept of constitutional liberty. It has never, we submit, been the law that government may violate the Bill of Rights with impunity if it can show that compliance would be burdensome. On the contrary, the cost of complying with constitutional mandate has never been accepted as an excuse for violation.

See, e.g., Hutto v. Finney, 437 U.S. 678 (1978); *Milliken v. Bradley,* 433 U.S. 267 (1977); *Bounds v. Smith,* 430 U.S. 817 (1977). It is worth noting that the scope and extent of potential governmental liability has expanded tremendously over the last thirty years without any apparent "chilling effect" upon the equally explosive growth of government and expansion of governmental activity over the same span of time.

1. The "Chilling Effect Limitation" Is Both Irrational And Irrelevant. The Proper Inquiry Is Whether Legitimate Planning Activity Is Impeded

The argument that awards of monetary damage might have a chilling effect upon essential government activities is not a novel one in California inverse condemnation authorities. *Bacich v. Board of Control,* 23 Cal. 2d 343, 350, 144 P.2d 818 (1943):

> "It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."

That passage was cited with approval in *Albers v. City of Los Angeles,* 62 Cal. 2d 250, 263, 42 Cal. Rptr. 89, 398 P.2d 129 (1965). But the *Albers* case *held* that public agencies should be *strictly liable* in inverse condemnation for physical invasions of property, whether or not the injury

could have been foreseen. By expanding the scope of liability beyond the limits of foreseeable risk, *Albers* in fact discarded the "chilling effect" rationale as a limitation upon liability in California. Since *Albers* the rule it stated has been applied to physicial invasions both transitory (*Orme v. State of California ex rel. Dept. Water Resources,* 83 Cal. App. 3d 178, 147 Cal. Rptr. 735, *hrg. denied* (1978)) and ephemeral (*Varjabedian v. City of Madera,* 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43 (1977)). Moreover, the invasion need only impair the *highest and best use* to be compensable.[12] Deprivation of all possibility of "reasonable return" (*Penn Central, supra,* 438 U.S. at 121) or all "reasonable beneficial use" (*id.* at 119-20) need not be shown.

In short, the "chilling effect limitation" has been wholly abandoned as a shield to damage liability in any taking case which remotely suggests physical invasion. There is no reason in logic or justice to treat differently takings accomplished through regulatory devices. The error has resulted, we submit, from a failure to distinguish *legitimate* planning activities—for which the "chilling effect" is a proper concern——from the varied abuses to which planning devices are put to effect surreptitious confiscation of land.

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[12] *Orme* awarded damages for loss of the ability to grow a rice crop for two growing seasons and for loss of the crop in the ground during the year when the conditions first arose. Rice cultivation was said to be the lands' highest and best use. 83 Cal. App. 3d at 180. There was no showing that the property had been deprived of all use—and it is reasonable to assume that it could have been used at least for pasturage or some other similar purpose.

We submit, therefore, that attempts to define liability in terms of a "chilling effect" limitation direct the inquiry toward an irrelevancy. The real effort should be to define the *legitimate scope of planning activity* to which all property must be held subject. This brief does not purport to set forth an exhaustive definition of the term. We do, however, contend that no view of the "legitimate scope of planning activity" can be consistent with constitutionally protected property rights and, at the same time, encompass any of the following cases:

(a) The regulations leave the property owner with nothing but economically unfeasible uses for his property and the degree of restriction is or ought to be known to the regulating authority in the exercise of reasonably diligent inquiry;

(b) The regulations have not been adopted or applied in good faith (which would include a case where uses purportedly allowed were frustrated by byzantine procedures and impossible findings requirements);

(c) Public facilities and services essential to an economically feasible use of the property have been deliberately withheld; or

(d) The property owner's commitment and degree of loss is in large part a reflection of inducements provided by the regulating body under circumstances where it would be inequitable to allow the inducements to be withdrawn without compensation.[13]

[13]A view adopted in part by the California Supreme Court in *Furey v. City of Sacramento*, 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P.2d 884 (1979), a case which invalidated an agricultural zone restriction.

Awards of compensation where any one of the foregoing showings can be made would not "chill" legitimate planning activities.[14]

2. California Planning Authorities Can Totally Protect Themselves By Ordinance Against "Surprise" Claims For Compensation

Local governing bodies have ample opportunity to protect themselves against the possibility that they may have exposed themselves to liability for compensation inadvertently—that they may have misunderstood the impact of their regulation upon a particular property owner. By providing for an administrative remedy in their ordinance, they gain control of the initial adjudication in a process which could purge the ordinance of its unconstitutional impact. Such an ordinance would provide that no property owner could file a suit for compensation in inverse condemnation without *first* applying for a conditional use permit for a use sufficient to provide an economic return in the manner most consistent with the goals and objectives of the applicable restrictions.

A property owner would be required to exhaust the administrative remedy. That exercise would allow the local governing body to evaluate its potential exposure with the

[14]We submit that an analysis directed toward an attempt to define the scope of legitimate planning activity is more useful than an attempt to determine whether or not a plan has been "implemented" (compare *Jones v. People ex rel. Dept. of Transportation*, 22 Cal. 3d 144, 148 Cal. Rptr. 640, 583 P.2d 165 (1978) with *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973)) or whether the action complained of deprives a property owner of something which has historically been viewed as an "incident of real estate" such as a right of access as in *Jones* or in a right to grow crops as in *Orme*. *See, e.g., Orme, supra*, 83 Cal. App. 3d at 138 n. 3.

property owner required to make his entire showing. Failure to exhaust the administrative remedy would preclude resort to the courts. *State of California v. Superior Court (Veta Co.)*, 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281 (1974); *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 109 P.2d 942 (1941). Under California law, the mere *existence* of an administrative remedy precludes a direct judicial attack, even when the plaintiff seeks to raise questions concerning the constitutional right of the administrative agency to exercise any jurisdiction at all vis-a-vis the subject matter. *South Coast Regional Comm'n v. Gordon*, 18 Cal. 3d 832, 135 Cal. Rptr. 781, 558 P.2d 867 (1977); *Metcalf v. County of Los Angeles*, 24 Cal. 2d 267, 148 P.2d 645 (1944).

And the exhaustion doctrine requires more than simply a perfunctory showing. The applicant must raise all issues and arguments before the administrative tribunal to preserve them for judicial review. *Bohn v. Watson*, 130 Cal. App. 2d 24, 278 P.2d 454 (1954), *hrg. denied* (1955). California statutes authorize California cities and counties to impose such a procedural gloss on their zoning ordinances by urgency measure adopted without notice. Calif. Govt. Code § 65858.[15]

[15]It is possible that conditionally permitted uses sufficient to avoid inverse condemnation exposure might conflict with applicable general plans. Although use permits may be issued without a finding of general plan conformity (*Hawkins v. County of Marin*, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754, *hrg. denied* (1976)), zoning ordinances must conform. Calif. Govt. Code § 65860. Again, however, general plans may be amended and planning agencies can initiate the change. The California Environmental Quality Act (Pub. Res. Code § 21000 and following) requires environmental assessment prior to adoption of a general plan or zoning ordinance but procedural amendments, *per se*, have no measurable environmental impact. Applications for use permit, of course, would be subject to environmental assessment on a detailed basis.

In short, California governmental entities have at their disposal, *and under their legislative control*, a tool to which they can immediately resort to minimize (if not eliminate entirely) the exposure arising out of possible claims associated or resulting from the unexpected or unintended impact of their regulations. This procedure would allow each governmental agency to hear a property owner's claim in a quasi-judicial proceeding,[16] and, if it found the claim persuasive, allow a land use which would preclude exposure to inverse condemnation liability.

An administrative procedure would not preclude judicial review.[17] It would absolutely prevent, however, any claim that the processes and functions of government were suffering inhibition due to the threat of undefined and unmeasureable claims, assertable without warning or opportunity to adjust the applicable planning constraints.

[16]*Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979); *Ward v. County of Riverside*, 273 Cal. App. 2d 353, 78 Cal. Rptr. 46 (1969). This rule is not unique to California. See, *e.g.*, *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975); *West v. City of Portage*, 392 Micn. 458, 221 N.W.2d 303 (1974); *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P.2d 23 (1973); and *Fleming v. City of Tacoma*, 81 Wn. 2d 292, 502 P.2d 327 (1972).

[17]There would be no trial *de novo* in the state courts. Review would be by administrative mandamus under Calif. Code of Civ. Proc. § 1094.5. *See, e.g., Winkelman v. City of Tiburon*, 32 Cal. App. 3d 834, 108 Cal. Rptr. 415 (1973). The court would probably review such a case by the "independent judgment" as opposed to the "substantial evidence" test under Calif. Code of Civ. Proc. § 1094.5(c). *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29 (1974).

C. Compensation Is The Only Practical Remedy When Government Takes Land By Regulation. The Regulatory Structure Is So Complex, Interdependent, And Time-Consuming That Declaratory Relief Will Never Suffice Against A Local Government Which Desires To Prevent Use Of Land

For many years local governing bodies have used land use controls and restrictive development standards to serve purely local interests. Most of the commentary decrying this phenomenon has related to regulations which drive out all but the most expensive forms of housing development. As this commentary foretells, however, "open space" zoning represents simply one more turn of the same screw to serve the same interests. The impact of that zoning falls upon those such as the Agins and HMBP who have been chosen to act as keepers of the public open space at their own expense.

We first review this commentary. We then summarize California land use planning and development control law to demonstrate the rich arsenal available to those who seek to impose constraints upon property which deprive property owners of all economic use. This material illustrates the purpose and means by which property owners are affected. It also demonstrates that compensation is the only practical remedy. Elimination of a restriction does not *ipso facto* authorize development, nor does it preclude the substitution of a new and equally onerous restriction. It does not prevent the adoption of a legislative moratorium to restudy an aspect of the control scheme thereby suspending an approval procured when a particular restriction is invalidated. Thus, in all but the most simple cases, a

decree declaring invalid a particular restriction would not vindicate the rights violated unless the court were willing to retain jurisdiction and virtually perform the land use planning function itself.

1. Land Use And Development Constraints Are Fashioned To Serve Local Interests And Operate By Restrictive Interaction To Achieve Purely Local Ends

The President's Committee on Urban Housing, in its report entitled A Decent Home (1968), wrote (at 142):

> "In many urban communities, the net effect of public land policies is to reduce the supply of land available for modest-cost housing and thus to increase its cost. Zoning and subdivision regulations are the most obvious policies having this effect. . . ."

The National Commission on Urban Problems noted in its report, Building The American City (1968), the obvious political thrust of open space and low density zoning schemes:

> "Most communities want all cream and no skim milk. They want the best, not only in physical structures and facilities, but also in the economic levels of people who will become their future citizens. . . . Each community engages in 'one-upmanship,' attempting to outdo its neighboring communities." *Id.* at 19.
>
> "Splintered governments thus operate toward increasing disparity in fiscal capacity, as well as toward narrow and parochial local policies of zoning, governmental service, and taxation." *Id.* at 330. See also A Decent Home 49.

More recently, the Rockefeller Brothers Fund Report, THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH (1973), observed that the same policies continue to prevail. If anything, they are getting steadily worse and affecting fundamental values of our society.

> "In the midst of a mobile and expanding population, local governments represent the people already there. Prospective residents, who may be destined to double or treble the population of the community, do not live within local boundaries and therefore do not vote. The local government thus speaks for the people who got there first.
>
> "Many of these first arrivals have recognized for many years that additional development has little to offer them. Some suburbs have engaged in a curious intermunicipal competition in which development (particularly low- or moderate-income housing) has been perceived as the common enemy, threatening to overrun the weak or inattentive locality. Municipal efforts to combat the threat have resembled nothing so much as competitive dikebuilding by neighboring landowners, each hoping that his higher dikes will keep the floodwaters off his own land and drive them onto his neighbors' instead. Even ten or fifteen years ago, local officials would privately explain that a new zoning amendment increasing minimum lot sizes was at least partly intended to keep up with requirements in a neighboring town." *Id.* at 225-226.

The commentaries lament the loss of housing opportunity resulting from overly restrictive development control procedures. But those deprived of housing (or forced to pay a higher price for it due to constricted supply) are

only indirectly affected. The property owner whose land is restricted bears the full brunt of the regulation.

In the case of HMBP, for example, local officials have decreed that it will be the unwilling custodian, at its own expense, of more than 10 square miles of open space to serve the current fancy of local residents to be surrounded by open space without the necessity of paying for it or even the cost of maintaining it. It is not that the lands so restricted cannot be developed in a manner consistent with sound planning principles, or that housing is unneeded. Quite the opposite. The restriction proceeds directly from the perception of people already there that the status quo should be preserved to benefit those who like things as they are—particularly when they can contrive to have the direct out-of-pocket costs and the lost opportunity cost borne by others.

California land use laws are uniquely well suited to the fashioning of development controls in a manner calculated to preserve the status quo. We turn to a discussion of those controls to demonstrate their intricacy, prevasive character and the ephemeral nature of any approval a property owner or developer might obtain.

2. The Structure Of California Land Use Planning Law

(a) *The General Plan.*

All land use and development restrictions imposed under California law are controlled by a comprehensive general plan which must be prepared by each City and County. Calif. Govt. Code § 65300. Because of the consistency requirements described below, inadequacy of any General

Plan Element or suspension of an element for amendment or study suspends the right to approve anything.

Calif. Govt. Code § 65300.5 expresses the legislative intent as follows:

> "In construing the provisions of this article [Article 5 pertaining to general plans], the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency."

A general plan consists of mandatory and optional "elements." Calif. Govt. Code § 65302 lists and describes the mandatory elements which are (a) land use, (b) circulation, (c) housing, (d) conservation, which includes subelements of (i) land and water reclamation, (ii) flood control, (iii) prevention of pollution, (iv) water course preservation, (v) erosion control, (vi) water protection, (vii) rock, sand and gravel resource quantification; (e) open space; (f) seismic safety; (g) noise control; (h) scenic highway; and (i) a safety element.

Many of these elements must be developed in great detail. For example, Calif. Govt. Code § 65302(a) states that the land use element must designate:

> ". . . the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall also identify elements covered by the plan which are subject to flooding and shall be reviewed annually with respect to such areas."

The noise element (Calif. Govt. Code § 65302(g)) requires that sources of noise be quantified and noise contours be developed with respect to specific decibel limitations. Other elements must be refined to a similar degree of mandatory detail.

Once adopted, a general plan may be supplemented or changed. Calif. Govt. Code § 65356.1. The Code contains limitations on amendment of mandatory elements of a general plan (Calif. Govt. Code § 65361) but does not limit the imposition of optional requirements.

All subsequent zoning and land use control enactments *must be found to conform to the general plan* without distinction between its mandatory and optional elements. Calif. Govt. Code § 65860. *Suspension of any part of the plan suspends the entire process.*

(b) *The Specific Plan.*

As an adjunct to the general planning power, the California Planning Act authorizes preparation of specific plans as may "be required for the systematic execution of the general plan" Calif. Govt. Code § 65450. A specific plan can deal with any subject matter necessary or convenient to the implementation of the general plan. Calif. Govt. Code § 65450.1. As its name implies, the specific plan concept provides a vehicle for the local governing body to define the precise location and nature of all uses which will be permitted in a particular area, defining development control down to lot size, permissible types

of construction and the location of all allowed uses. Calif. Govt. Code § 65451.

Local agencies are granted broad discretion in implementing and carrying out specific plans. See Calif. Govt. Code § 65550 *et seq.* Generally, however, no public improvement (such as a street, road or drainage facility) can be approved without an express finding of conformity to any applicable specific plan. *See* Calif. Govt. Code §§ 65552, 65553. Since development typically requires construction of public improvements, these sections virtually require that development proposals conform to the specific as well as general plans. Other requirements we will describe below operate similarly.

(c) *The Open Space Element.*

As noted above, an open space element is a mandatory component of a general plan. Article 10.5 of Chapter 3, Division 1, Title 7 of the Calif. Govt. Code (§ 65560 *et seq.*) establishes an elaborate series of separate requirements for the open space element of a general plan. These include a requirement that local agencies inventory all open space resources (a euphemism for all undeveloped land, See Calif. Govt. Code § 65560(b)) and adopt a specific "action program" to carry out the open space plan. Calif. Govt. Code § 65564. The action program may be implemented or refined by a specific plan.

Calif. Govt. Code § 65567 provides that:

> "No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan."

Under this provision, mere identification of a particular parcel of property as a valuable open space resource in the community could prevent use of the property as a site for any structures or for any development purpose due to the consistency requirement.

Inadequacy of the open space element or suspension for "study" stops everything. An attack on the adequacy of the element calls every permit issued since its adoption into question. *Save El Toro Assn. v. Days,* 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977).[18]

(d) *Zoning Ordinances.*

Calif. Govt. Code § 65800, and following, provides for adoption of zoning ordinances under the umbrella of a statement of intent to the effect that:

> ". . . the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."

Under Calif. Govt. Code § 65860, however, zoning ordinances must conform to applicable general plans.

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[18]Litigation to challenge the adequacy of general plans, conformity of ordinances and other acts with general plan requirements, compliance with required procedures and adherence to environmental processing requirements is immeasurably encouraged by the total absence of any meaningful standing requirement in California. As a result, any citizens group with a filing fee can bring the whole process to a halt pending the outcome of the litigation. *See, e.g., No Oil, Inc. v. City of Los Angeles,* 13 Cal. 3d 68, 118 Cal. Rptr. 34, 529 P.2d 66 (1974); *Topanga Assn. For A Scenic Community v. County of Los Angeles,* 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12 (1974); *Friends of Mammoth v. Mono County,* 8 Cal. 3d 247, 502 P.2d 1049 (1972); *Mountain Defense League v. Board of Supervisors,* 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977).

(e) *Subdivision Approval.*

The California Subdivision Map Act, Calif. Govt. Code § 66410 *et seq.*, applies to any division of land "for the purpose of sale, lease or financing, whether immediate or future." Calif. Govt. Code § 66424. As a practical matter, this broad definition brings under the California Subdivision Map Act almost every conceivable type of land development activity other than an application for a building permit on an already divided and approved lot.

Calif. Govt. Code § 66473.5 provides that:

> "No local agency shall approve a [subdivision] map unless the legislative body shall find that the proposed subdivision . . . is consistent with the general plan . . . ."

Calif. Govt. Code § 66474 provides:

> "A legislative body of a city or county shall deny approval of a final or tentative map if it makes any of the following findings:
>
> "(a) That the proposed map is not consistent with applicable general and specific plans.
>
> "(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.
>
> "(c) That the site is not physically suitable for the type of development.
>
> "(d) That the site is not physically suitable for the proposed density of development.
>
> "(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage . . . ."
>
> "(f) That the design of the subdivision or the type of improvements is likely to cause serious public health problems . . . ."

Subsections (c), (d), (e) and (f) reopen for reconsideration, in the context of a specific subdivision proposal, matters which should already have been resolved at the general and specific plan stages. The fact that specific findings must be made on these issues, *in addition to findings of conformity with the specific and general plan,* evinces a legislative intent to allow such fresh inquiry and re-evaluation.

(f) *The Blanket Moratorium Provision.*

In addition to the right of the city or county to rethink its general plan and specific plans in the context of a specific subdivision proposal, Calif. Govt. Code § 65858 sanctions suspension of development authorization by urgency measure adopted without notice. That section provides:

> "Without following the procedures otherwise required preliminary to the adoption of a zoning ordinance [which provisions include notice and public hearing, *see, e.g.,* Calif. Govt. Code § 65856], the legislative body, to protect the public safety, health and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated zoning proposal which the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. . . ."

Under this remarkable procedure, a factor as inchoate as planning department *intention* to study an element of the general plan at some "reasonable time" in the future can operate to prohibit *any use* which might conceivably conflict with *any proposal* which might be produced by *any such study* if it is ever undertaken. The statute

authorizes continuation of the moratorium for a period of up to two years. Such procedures have been upheld on judicial review. *See Metro Realty v. County of El Dorado,* 22 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963).

(g) *The Elimination Of Vested Rights*

Under the foregoing structure, a parcel of land, such as that owned by HMBP or the Agins, could be approved for development under the applicable general plan, a specific plan, applicable zoning ordinances and an approved subdivision map and still be subject to moratorium or revocation of the use permissions. Under California law, a prior approval does not confer a vested right to build unless a building permit has been obtained. *Avco Community Developers, Inc. v. South Coast Regional Comm'n,* 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976), *appeal dismissed,* 429 U.S. 1083 (1977); *Oceanic California, Inc. v. North Central Coast Regional Comm'n,* 63 Cal. App. 3d 57, 133 Cal. Rptr. 664, *hrg. denied* (1976), *appeal dismissed,* 431 U.S. 951 (1977).[19]

[19]In *Youngblood v. Board of Supervisors,* 22 Cal. 3d 644, 150 Cal. Rptr. 242, 586 P.2d 556 (1978), the California Supreme Court held that a tentative subdivision map approved prior to adoption of a general plan amendment fixed and established the parameters by which the final subdivision map would be controlled even though the final map would conflict with the then applicable general plan. In effect, the subdivider acquired vested rights to complete the subdivision process as against the subsequent general plan change. But completion of the subdivision process will give him no assurance of the right to use the lots for their intended purpose. Fully subdivided lots creating legal building sites when the subdivision occurred have been held expressly subject to subsequently enacted regulations which, for all practical purposes, render the lots no longer usable as building sites. *Oceanic California Inc. v. North Central Coast Regional Comm'n, supra; Hill v. Manhattan Beach,* 6 Cal. 3d 279, 98 Cal. Rptr. 785, 491 P.2d 369 (1971).

Even a building permit does not protect the property owner totally. If the permit is invalid, the structure built in reliance upon it remains subject to abatement, regardless of the property owner's good faith. *Pettitt v. City of Fresno,* 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973). And, of course, the permit's validity can be called into question by an attack upon the open space element with which the permit must conform. Calif. Govt. Code § 65567.

3. Summary Of California Land Use Controls

This discussion of California land use law only begins to reveal its complexity. The reality is much worse. We have, for example, not even considered here the interconnection of these laws with the requirements of the California Environmental Quality Act (Calif. Pub. Res. Code §§ 21000 *et seq.*) or the California Coastal Zone Conservation Act (Calif. Pub. Res. Code §§ 27000 *et seq.*).

It should, however, be clear that California law expressly authorizes continuous re-examination of development approval standards at least until a valid building permit has been issued for each structure in the development, no matter how detailed the prior approvals might have been. See, *e.g.,* the precise and exacting standards required under Appellee's Ordinance 123 N.S., § 10-4(G) (Jur. Stmt. App. 33 *et seq.*). Approval of one structure does not create any right to approval of another or any protection against suspension of any approval no matter how often it may have been officially reiterated. *Frisco Land & Mining Co. v. State of California,* 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), *hrg. denied* (1978).

A landowner may have a comprehensive development proposal specifically approved through a general plan amendment, adoption of a specific plan, adoption of implementing zoning ordinances, approval of tentative subdivision maps (in a procedure in which the entire rationale of the applicable general and specific plans can be reconsidered in the light of the specific development proposal)—and the approval thus obtained is essentially ephemeral, subject to summary suspension and revocation without notice or opportunity to be heard. To achieve the approval through general plan, specific plan, zoning ordinance and subdivision processing while complying with applicable environmental reporting requirements, the proposal will be subject to several full public hearings and intensive processing delay, depending upon the degree of local controversy.

4. A Decree Of Invalidity Is A Meaningless Remedy In This Context

A review of California's regulations demonstrates that it would be impossible for a court in the typical case to grant effective relief by a decree invalidating a specific restriction. For example, if a landowner encountered a subdivision map denial under Calif. Govt. Code § 66474(c) on the grounds that the development site was "not physically suitable for the type of development" notwithstanding its compliance with the applicable general plan and specific plan, a court could, upon a finding that such denial violated the owner's constitutional rights, order approval of the subdivision map. This decree would not prevent, however, an urgency moratorium adopted under Calif. Govt. Code §65858 to study

the possibility of a change in the general plan, specific plan or applicable zoning ordinance to accommodate the considerations of physical suitability which prompted the finding. It would not prevent suspension of the open space element for further study thus preventing issuance of building permits. Calif. Govt. Code § 65567.

To put it bluntly, if local government desires to prevent use of the land it has an arsenal of procedures guaranteed to consume years of the owner's time and thousands of his dollars.

The court, of course, might choose to retain jurisdiction and act as a super planning agency itself. Courts have such powers and have occasionally exercised them. *See, e.g., Gautreaux v. Chicago Housing Authority,* 296 F. Supp. 907 (N. D. Ill. 1969), *decree granted,* 304 F. Supp. 736 (N. D. Ill. 1969), *aff'd,* 436 F.2d 306 (7th Cir. 1970), *stay denied,* 401 U.S. 953 (1971); *Berenson v. Town of Newcastle,* 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975). But it is an extremely ambitious adventure, rarely tried.

More fundamentally, this situation stands the primary rule of equity on its head. For here (unlike *Gautreaux* and *Berenson*) we have a context in which *the injury can be adequately compensated by an award of money damages.* Indeed, money damages provide the traditional form of relief. It is the *defendant* who argues[20] that an award of money damages threatens it.

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[20]Erroneously. See *ante,* Part B.2.

CONCLUSION

This Court should reverse the decision of the California Supreme Court. It should hold that regulations which deprive property owners, such as the Agins, of all economically feasible uses of their property violate their rights under the Fifth and Fourteenth Amendments of the United States Constitution. The Court should state that the *impact* of a regulation cannot be determined from the face of the regulation—that the purported allowance of a use does not establish that the use so allowed is *ipso facto* sufficient to fulfill constitutional requirements. And where the burden of the restriction exceeds constitutionally permissible limits, the Court should declare that monetary compensation for the property owners' loss is the proper remedy.

Dated: February 20, 1980

Respectfully submitted,

HOWARD N. ELLMAN
KENNETH N. BURNS
MICHAEL J. BURKE
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By HOWARD N. ELLMAN
Attorneys for Amicus Curiae Half Moon Bay Properties, Inc.

APPENDIX A

APPENDIX A

Law Offices
Pollock, Williams & Berwanger [Letterhead]

January 18, 1980

Half Moon Bay Properties
c/o Ellman, Passovoy & Burke
One Ecker Bldg.—Suite 210
Ecker & Stevenson Streets
San Francisco, CA 94105

Re: Agins v. City of Tiburon
United States Supreme Court
No. 79-602

Gentlemen:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above-captioned case now pending before the United States Supreme Court. On behalf of the attorneys for the Appellant in that case, I hereby give such consent.

Very truly yours,

/s/ JOHN P. POLLOCK

for Pollock, Williams & Berwanger

JPP:jb

cc: Gideon Kanner, Esq.
Reginald Hearn, Esq.

City of Tiburon

Office of the City Attorney [Letterhead]

January 21, 1980

Kenneth N. Burns, Esq.
Ellman, Passovoy & Burke
Attorneys at Law
One Ecker Bldg., Suite 210
San Francisco, CA 94105

Re: Agins v. City of Tiburon
U. S. Supreme Court No. 79-602

Dear Mr. Burns:

You have advised that you represent Half Moon Bay Properties and that you wish to file an amicus brief in the U. S. Supreme Court on behalf of your client.

Please be advised that you have permission of Appellee, the Town of Tiburon, to file an amicus brief in the above.

Very truly yours,

/s/ Robert I. Conn
Robert I. Conn
Town Attorney

RIC/njt
cc: Mr. John P. Pollock
cc: Mr. Reginald G. Hearn
cc: Mr. Gideon Kanner